REMARKS

Claims 1-20 are pending in the present application.

Reconsideration of the claims is respectfully requested.

35 U.S.C. § 103 (Obviousness)

Claims 1–6 and 8–15 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,285,926 to *Falk et al* in view of U.S. Patent No. 4,317,604 to *Krakauer*. Claims 7 and 16–20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Falk et al* in view of *Krakauer* and further in view of U.S. Patent No. 5,313,393 to *Varley*. These rejections are respectfully traversed.

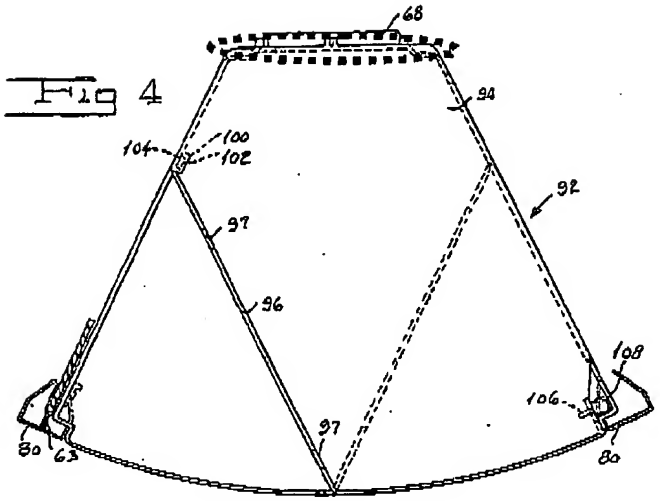
In *ex parte* examination of patent applications, the Patent Office bears the burden of establishing a *prima facie* case of obviousness. MPEP § 2142, p. 2100-127 (8th ed. rev. 6 September 2007). Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. *Id.*

To establish a prima facie case of obviousness, three basic criteria must be met: First, there must be some reason – such as a suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art – to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all of the claim limitations. *Id.*

Independent claims 1, 10 and 17 each recite one or more tray subdividers that may be selectively mounted in any of two or more predetermined positions, at least one of the

predetermined positions being radially askew, extending from the first portion of the tray's periphery to a second portion that the periphery. The claims further define the first portion of the tray periphery as having first and second ends and abutting the support along an entire length between the first and second ends when mounted. Thus at least one end of the radially askew subdivider must terminate at the portion of the tray abutting the column when the tray is mounted. Such a feature is not found in the cited references. *Krakauer*, cited in the Office Action as teaching this feature, actually teaches a tray subdivider extending from a portion of the tray periphery defined in the claims as the third or fourth periphery portion, extending between ends of the first periphery portion (abutting the support column) to a second periphery portion distal from the first periphery portion. *Krakauer* discloses a tray 64 having a locating member 68 extending from a rear portion of the periphery of the tray 64 and received by a slot 70 within the support column 36. It is the portion of the periphery of the tray 64 from which the locating member 36 protrudes that abuts the support column 36 when the shelf dividing member 92 is mounted to the support column 36. Accordingly, only that portion of the periphery of the tray 64, circled by a thick dotted line below, can satisfy the claim limitation that the first periphery portion abut the support along an entire length between the first and second ends of the first periphery portion when the tray is mounted to the support:

Fig 4



Baffle 96 does not extend from that periphery portion of tray 64, and therefore does not satisfy the claims. The portion of the periphery of tray 64 in *Krakauer* at recess 104, cited in the Office Action, does not satisfy the limitation of a "first portion" of the periphery as that portion is defined within the claims. Accordingly baffle 96 is not "radially askew from the first [tray periphery] portion to the second portion."

Moreover, to the extent that the Office Action urges that some unstated reason exists to modify *Krakauer* to achieve the claimed invention, the claim requires a tray allowing that tray subdividers to be selectively mounted in the radially askew position. No explanation is offered in the Office Action for how such selective mounting could be achieve with one end at the tray periphery portion abutting the support column when mounted.

The Office Action states:

> It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teachings of Falk to include subdividers positioned in a radially askew orientation in a tray as taught by Krakauer because positioning subdividers is [sic] an askew orientation would reduce wastage of tray

space.

It would have been further obvious to one of ordinary skill in the art at the time the invention was made to modify the teachings of Falk in view of Krakauer to position subdividers in a radially askew orientation wherein the subdivider extend [sic] from the inner central portion of the tray to a position on the outer edge of the tray, thus the subdivider are disposed in a radially askew direction to the central support column of the vending machine in order to further customize the tray zone sizes.

Paper No. 20080512, pages 3-4. However, the record contains no support for the conclusory statements within the Office Action, and the "motivation" proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. No explanation is given for how the radially askew subdividers "reduce[s] wastage of tray space," and the general "incentive" to "further customize the tray zone sizes" is mere circular logic by which the modification is self-justified by the result. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Independent claim 5 recites five trays mounted at each of nine levels and spaced approximately five inches apart. This combination of trays, levels and spacing is disclosed in the specification (paragraphs [0030]-[0031]) as allowing placement of soft drink cans and nine inch platters on tray sections. Nothing in the cited references suggests such a combination of these features. In connection with this limitation, the Office Action states:

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer to include only five tray at each level on the center support member (34) versus six trays as specifically taught by Falk (also see 7 trays taught in Krakauer; Figure 2) because a five tray vending machine would be smaller in size and thus require a smaller footprint.

It would have been further obvious to one of ordinary skill in the art at the

> time the invention was made to modify the teaching of Falk in view of Krakauer to include a distance between each level of the tray platform to be five inches apart. Such a selection would represent a mere design choice of space required for displaying the target items and be well within the level of skill of an artisan.

Paper No. 20080512, page 6. However, the use of five trays rather than six or seven would not necessarily result in a smaller footprint vending machine. The number of trays employed merely relates to how a 360° area is divided; the footprint of the vending machine will depend more on the radial dimension of the trays, which is not dependent upon the number of trays employed at a given level. With respect to the assertion that five inch spacing between tray levels would be "a mere design choice," to the extent the Office Action asserts that the recited configuation is *per se* obvious, obviousness inquiries have been deemed not to be amenable to *per se* rules due to their highly fact-specific and fact-intensive nature. *In re Ochiai*, 71 F.3d 1565, 1569 (Fed. Cir. 1995). Mere citation of a per se rule regarding what constitutes obvious modifications, without identifying a motivation or incentive for the proposed modification, does not establish a *prima facie* case of obviousness. In addition, the record contains no support for the conclusory statements within the Office Action, and the "motivation" proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Independent claim 7 recites a catch on the tray subdivider stopping the vend door. Such a feature is not found in the cited references. The Office Action concedes that none of the cited references teach placing the door catch on the tray subdivider:

> Falk et al. does not disclose using a catch on a tray subdivider for controlling the distance of the vend door opening.
>
> . . . .
>
> Varley teaches of positioning the catch mechanism on the outside of the level tray (Figure 5) but does not disclose positioning the tray latch pin (57) on the partition subdividers.
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> It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer and Varley to include (incorporate) latch pins disposed on the subdividers to control the size of access to proximate to the position of the location o the subdividers because the control mechanism will not be need to be calibrated once the sizes of the tray zones is changed as different size products are set to be displayed.

Paper No. 20080512, pages 8-9. The "motivation" proposed in the Office Action improperly employs the teachings of the subject application. Moreover, it should be noted that the latch pin 57 is not a stop for controlling opening of the door, but is instead a mechanism for allowing the user to rotate the shelves 24a, 24b, etc. by opening the door. In addition, the record contains no support for the conclusory statements within the Office Action, and the "motivation" proposed is nothing more than hindsight reconstruction of the invention, packaging the result of the changes as a purported incentive. Moreover, the Office Action fails to make a determination as to the level of ordinary skill in the relevant art at the time that the invention was made. Accordingly, the rejection is arbitrary and capricious.

Therefore, the rejection of claims 1-20 under 35 U.S.C. § 103 has been overcome.

If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at ***dvenglarik@munckcarter.com***.

The Commissioner is hereby authorized to charge any additional fees connected with this communication (including any extension of time fees) or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

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